Supreme Court, U.S.
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No. 99——

In The Supreme Court of the United States

ELEANOR SEBASTIAN, *et al.*,
Petitioners

v.

THE UNITED STATES

Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

PETITION FOR A WRIT OF CERTIORARI

MICHAEL J. KATOR *
LAURA A. STEFANI
KATOR, SCOTT & PARKS, P.L.L.C.
1899 L Street, N.W., Suite 1275
Washington, D.C. 20036
(202) 898-4800

EUGENE O. DUFFY
O'NEIL, CANNON & HOLLMAN, S.C.
111 East Wisconsin Avenue
Suite 1400
Milwaukee, WI 53202
(414) 276-5000

* Counsel of Record

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QUESTION PRESENTED

Must the United States pay just compensation to retired members of its Armed Forces when it deprives them of deferred compensation in the form of medical benefits that are due for services already performed?

PARTIES TO THE PROCEEDING

Parties to this proceeding are: Eleanor Sebastian, Lewis Hinson, Robert Lowery, Charles W. Newhouser, Dennis Reynolds, Herbert Brown, Rudolph Singleton, James K. Rogers, Blane K. Lawson, Louie Hinson, Woody Nesbitt, Marion Pearson, Ronald D'Anella, Walter Ewing, Leonard Bartlette, and the Coalition of Retired Military Veterans.

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Petitioners, Eleanor Sebastian, Lewis Hinson, Robert Lowery, Charles W. Newhouser, Dennis Reynolds, Herbert Brown, Rudolph Singleton, James K. Rogers, Blane K. Lawson, Louie Hinson, Woody Nesbitt, Marion Pearson, Ronald D'Anella, Walter Ewing, Leonard Bartlette, and the Coalition of Retired Military Veterans, hereby petition this Court for a writ of certiorari to the United States Court of Appeals for the Federal Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Federal Circuit (App. A at 1a-11a) is reported at 185 F.3d 1368. No petition for rehearing was sought. The opinion of the district court on defendant's motion to dismiss (App. B at 12a-24a) is unreported, as is the opinion

of the district court on plaintiffs' motion to alter or amend the judgment (App. C at 25a-26a).

JURISDICTION

The court of appeals issued its decision on August 9, 1999. Petitioners requested, and this Court issued, an extension of time to file their Petition by December 8, 1999. Accordingly, this petition is filed within the time allowed by law. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT

Petitioners are several military retirees, or the spouses of deceased military retirees. While on active duty in the Armed Forces of the United States, these service members were promised life-long medical care as an inducement to devote career service to the military, and, principally because of this inducement, these service members dedicated the majority of their working lives to militatry service. The Coalition of Retired Military Veterans is a not-for-profit corporation comprised of several thousand members who, like the named petitioners, were promised but later denied lifetime medical care. The Coalition was organized for the express purpose of challenging the government's failure to live up to its promise to military retirees to provide them their earned health care benefits.

Since at least the days of Patrick Henry, Americans have believed that "[t]he ideas of liberty and equality .... are worth fighting for." *Texas v. Johnson*, 491 U.S. 397, 439 (1989) (Stevens, J., dissenting). Our Nation was wrested from tyranny with the lives and blood of patriots and it has survived into its third century because some Americans, when called to duty, were prepared to lay down their lives in defense of this Nation and the ideals upon which it was built.

One of those bedrock ideals, embodied in the Fifth Amendment, is fundamental fairness. Petitioners in this case, aging veterans of World War II, Korea and Vietnam, have risen once more to fight for this constitutional right. They fight to have their government honor the commitment it made to them; they fight to prove that the government they devoted their lives to defending is worth the sacrifice that they and many who came before them made.

Since at least the late 1700s, the United States assured those citizens who dedicated their lives to a career in the Armed Forces that medical and dental care would be provided for them. *See Schism v. United States*, 19 F. Supp. 2d 1287, 1293 (N.D. Fla. 1998) (citing, among other statutes, the Act of March 2, 1799 (Sec. 4808, Rev. Stat.)). This promise has so worked its way into the fabric of military life that, time and time again, Congress has recognized its "moral obligation" to live up to this promise. *See Hearings on CHAMPUS and Military Health Care, infra.*

Throughout the twentieth century, the promise of lifetime medical care has been a cornerstone of military recruitment. Recruiters repeatedly promised military members that lifetime medical care would be one of the few benefits provided to them in exchange for their military service. In fact, a Department of Army survey found that, "enlisted personnel rated the provision of medical benefits the single, strongest influence in their decision to stay in the Army." *See Hearings on CHAMPUS and Military Health Care* Before the Subcomm. No. 2 of the House Comm. on Armed Services, 93rd Cong., 2d Sess. (1974), p. 59 (*quoting Survey Estimate of Retention of Army Personnel*, August 31, 1971).

In 1974, a special subcommittee of the Committee on Armed Services was convened to study issues surrounding

the government's obligation to fulfill this promise of lifetime medical care. Citing back to congressional studies conducted a decade earlier, the Subcommittee concluded:

> Retired personnel and their dependents have been traditionally granted medical care in uniformed services facilities. A special subcommittee of this committee, chaired by the Honorable Mendel L. Rivers of South Carolina, concluded after an extensive study of military hospital policy in 1964, that the government has a clear moral obligation to provide medical care to retired personnel and their dependents. That subcommittee found that **such care had been assured by custom and tradition through most of the life of the Republic.** That subcommittee also found numerous examples of recruitment and retention literature which pledged that the government would provide medical care for the man and his family following retirement.

See, Hearings on CHAMPUS and Military Health Care Before the Subcomm. No. 2 of the House Comm. on Armed Services, 93rd Cong., 2d Sess., p. 295 (*quoting* Report No. 1407, 89th Cong., 2d Sess., p. 22) (emphasis added). In testifying before Congress in 1974, the Surgeon Generals of the Army, Navy and Air Force testified that they agreed with these congressional findings. *See* Testimony of Lt. Gen. R. R. Taylor, U.S. Army, *Hearings on CHAMPUS and Military Health Care,* p. 118. In follow-up questioning regarding the government's obligation to provide the entitlement at issue in this case, Surgeon General Taylor testified: "[w]hen I read title 10 of the United States Code, I think it spells out very clearly a legal requirement." *Id.,* at 119. Congress subsequently directed the military departments that when programming space for medical care they should consider the need to provide treatment for retirees and their dependents as well as active military members. *Hear-*

ings on Military Medical Benefits As Proposed in H.R. 9271, H.R. 13582, and H.R. 13583 Before the Subcomm. No. 2 of the House Comm. on Armed Services, 89th Cong., 2d Sess. 5739 (1966).

For the most part, until very recently, the military departments did provide the promised care. But in 1995, the Secretary of Defense issued regulations implementing a new system called "TRICARE." Under this system, retirees under the age of 65 could maintain their prior eligibility for treatment at military facilities, but only upon payment of a substantial premium. Retirees over the age of 65 no longer were eligible for treatment at military facilities. They were relegated solely to Medicare, eligible for outpatient benefits (Medicare Part B) only upon payment of a premium, and stripped of any prescription drug benefit. Thus, far from enjoying lifetime medical care, military retirees became the only American employees who lost their health insurance coverage altogether when they reached age 65. For those retirees living on a fixed income, and in particular spouses of deceased service members, these decreased benefits and new costs came just when they needed these benefits most.

Petitioners filed suit in the District Court for South Carolina claiming that the Armed Services, pursuant to the authority granted to them by Congress, promised as an inducement to commit to career service in the military that upon retirement they would enjoy life-long medical coverage. They further alleged that this entitlement to health care benefits upon retirement was deferred compensation earned but yet to be paid and they sued the United States for damages (not to exceed $10,000 each)

representing the diminution in the value of the compensation they were owed but not paid.[1]

Importantly, petitioners did not in any way seek to challenge the constitutionality or validity of Congress' decision to direct the Department of Defense to renege on this promise of lifetime health care to military retirees. Rather, their claim was that the extirpation of this deferred compensation constitutes a compensable taking under the Fifth Amendment.

The government moved to dismiss, contending among other things that petitioners failed to state a claim upon which relief could be granted. The government did not dispute that promises of lifetime health care had been made to the retirees, but disputed that these promises rose to the level of enforceable property interests. In essence, the government claimed that the promises were made without statutory authority and were thus unenforceable.

Petitioners identified two statutory bases for the military's undisputed practice of offering lifetime medical care as a career retention tool. First, prior to 1956, the military department secretaries each had general authority under 5 U.S.C. § 301 to "prescribe regulations for the government of his department, . . . the distribution and performance of its business, and the custody, use and preservation of its . . . property." In 1956, Congress enhanced this authority by enacting 10 U.S.C. § 1074(b), which explicitly authorizes the military departments to provide health care to retirees. Specifically, the statute provides that military retirees:

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[1] Petitioners brought suit for money damages under the Little Tucker Act, 28 U.S.C. § 1346(a)(2). In addition, the Coalition of Retired Military Veterans sought a declaration that the promised benefits were deferred compensation promised but not delivered. The district court held that it lacked jurisdiction to provide any relief.

> may, upon request, be given medical and dental care in any facility of any uniformed service, subject to the availability of space and facilities and the capabilities of the medical and dental staff. The administrating secretaries may . . . provide care to persons covered by this subsection in facilities operated by the Secretary of Veterans Affairs and determined by him to be available for this purpose on a reimbursable basis . . . .

10 U.S.C. § 1074(b) (1996). This statute, petitioners argued, expressly provided the requisite congressional authorization for the promise: Congress allowed the military branches to provide medical care to retirees on a "space available" basis, and the military departments, with congressional approbation and appropriation, made sufficient space available to fulfill the promise.

The district court, "with genuine regret," (App. B at 14a) granted the government's motion. But because the court relied on historical regulations supplied by the government in its post-hearing submission, petitioners sought the opportunity to re-open or amend their complaint and to conduct discovery to obtain other historical regulations and unreported service directives having the force of regulation in support of their claim. The district court denied petitioners' request. App. C at 25a-26a.

On appeal, the Federal Circuit affirmed. The court held that the statutes and regulations cited by petitioners did not "provide[] for unconditional lifetime free medical care." App. A at 7a. The court held that the various regulations cited by petitioners did not create a property right because, in the court's view, "whether a retiree could receive medical care depended on the fulfillment of various conditions." App. A at 6a. The court reasoned that because the regulations covered, for example,

only hospital care or "only the priod when [the regulation] was in effect," no property right existed. App. A at 8a.

This petition timely followed.

REASONS FOR GRANTING THE PETITION

This case presents issues of substantial public importance concerning the constitutional protections afforded to public employees' compensation. Over one million military retirees who, like petitioners, have been stripped of their earned health care benefits are directly affected by this case. Those Americans who have made a career out of putting their lives on the line to defend our country cannot be divested of their rightfully-earned compensation simply because they are no longer of use to the government. Review by this Court is necessary to assure that our government, like its citizens, honors its debts.

1. In *Board of Regents v. Roth*, 408 U.S. 564, 576 (1972), this Court held that the Constitution's "procedural protection of property is a safeguard of the security of interests that a person **has already acquired** in specific benefits" (emphasis added). Benefits received "under statutory and administrative standards defining eligibility for them" are constitutionally protected property rights. *Id.; see also, Perry v. Sindermann*, 408 U.S. 593, 601 (1972) (finding that property interests "are not limited by a few rigid, technical forms.").

The government has conceded that Armed Forces recruiters offered the promise of lifetime medical care as an inducement to make service members commit to career military service. Publications such as the Navy's *Bluejackets' Manual*, the Army's *Field Manual* and others are replete with promises to this effect. *See, e.g., Schism v. United States*, 19 F. Supp. 2d at 1294 ("the *Soldier's*

Guide [the Department of the Army Field Manual], states that retired soldiers are entitled to 'commissary, post exchange privileges, medical care, and hospitalization.' "). It was no accident that all the services were making this same promise: the policy of the military departments, as petitioners alleged in their complaint, was to offer this inducement.[2]

Petitioners claimed that this promise of continued medical care became part of their compensation. They argued that 5 U.S.C. § 301 authorized the military departments to provide medical care to retirees and similarly to make the promise of continued medical care as a retention tool. To be sure, this benefit was deferred compensation—but no less a part of the *quid pro quo* for their service than their pay. And, of course, deferred compensation is no less compensation and no less property simply because it is deferred. *Davis v. Michigan Department of Treasury*, 489 U.S. 803 (1989); *Barker v. Kansas*, 503 U.S. 594 (1992).

The court below did not question that the promises were made or were indeed pivotal inducements in petitioners' decisions to commit to career service. Rather, the court held that the military departments had no statutory authority to make these promises. App. A at 5a. Thus, the court below essentially held that petitioners were duped by the very government they fought to defend. App. A at 7a.

The court below erred in so parsimoniously construing petitioners' property interests. Property interests should be broadly understood, and not narrowly defined. Such inter-

[2] These regulations and instructions were "part of the governing law in effect when the agreement was executed and could not be disregarded in the interpretation of the agreement." *Rehart v. Clark*, 448 F.2d 170, 173 (9th Cir. 1971).

ests cannot be limited by superficially labeling the underlying statute a "housekeeping" statute. But the court below did just that: simply because the regulations conferring the retirees' right to medical care were promulgated under a "housekeeping" statute, it held, no property right existed. App. A at 5a. This analysis flouts this Court's holdings and fails to recognize Congress' creation of the property at issue.

Roth prescribed that courts must search for "rules or understandings that secure certain benefits," 408 U.S. at 577, as well as "rule[s] or polic[ies] that secure[d]" these interests. *Id.*, at 578. In other words, this Court did not limit itself solely to review of a statute in determining if a property right had been conferred. By contrast, the Federal Circuit in the case at hand ignored the custom, practice and repeated legislative ratification of the promise and instead erroneously confined its review to whether petitioners had cited statutes that unambiguously supported their claim of a right to continued health care.

Regardless of whether 5 U.S.C. § 301 can be characterized as a "housekeeping" statute, whether § 301 provided a sufficient grant of legislative authority to the military departments to confer a property right to health care is a much different matter. No one would seriously contend that the military exceeded the scope of § 301 by promulgating regulations concerning retirees' health benefits. To do so violates the doctrine of *Chevron, U.S.A., Inc. v. Natural Resources Defense Counsel, Inc.*, 467 U.S. 837 (1984), which bars judicial review of the lawfulness of agency regulations that are not contrary to statute and are reasonable. The legislative history here indicates that the military departments' policies and regulations were entirely reasonable and made under explicit delegated congressional authority. And, if these regulations were

lawfully promulgated, then they can serve to create property. That the Federal Circuit found § 301 inept without finding such unlawfulness is reason enough for this Court's review.

More troubling, however, is the court's superficial reading of the various regulations cited by petitioners in support of their claim, and its cursory conclusion that there only existed a "general pattern of the military regulations that provides medical care to retirees only when facilities and personnel were available." App. A at 8a. Such a conclusion disregards the facts, congressional intent and common sense. For example, Army Regulation 40-590 ¶ 6(b) (1935), provided for hospitalization of retirees when "in the judgment of the commanding officer of the hospital [they] will be benefitted by hospitalization for a reasonable time."[3] App. A at 6a. This "condition" is certainly not a condition of availability of space or resources, but rather a reasonable requirement that a retiree have a condition requiring hospitalization prior to actually being hospitalized. As this Court held in *Goldberg v. Kelly*, 397 U.S. 259, 261-262 (1970), government benefits "for persons qualified to receive them" are a constitutionally protected property right. Under *Goldberg* and its progeny, the fact that the benefits may be qualified does not negate the existence of a property right to those benefits. Here, however, the Federal Circuit completely ignores this basic principle in its zeal to deny health care to those most deserving—military retirees who risked their lives to protect the freedom of all Americans.

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[3] Similarly, Air Force Regulation 160-73 ¶ 14h (1951), stated that the hospitalization of retirees "will be limited to cases which in the judgment of the hospital commander will be benefitted by hospitalization for a reasonable length of time." App. A at 7a.

In the same way, the court below erred in its examination of regulations allowing retirees hospital admission after they "seek authority for admission," Navy Regulation 1920 § 12 Article 1830 (1927), or "upon the application of the individual and the presentation of suitable identification." App. A at 7a (quoting Section 4132.1 of the 1945 Manual of the Medical Department of the United States Navy). Surely common sense dictates that the requirement to fill out an application and show some identification does not destroy a claim to a property right. After all, the welfare recipients in *Goldberg*, the social security recipients in *Mathews v. Eldridge*, 424 U.S. 319 (1976), and the enlisted Navy personnel in *United States v. Larionoff*, 431 U.S. 864 (1977), all certainly had to complete paperwork or show some proof of eligibility at some point. This Court did not find such formalities to be inimical to a finding that these Americans possessed constitutionally protected property rights.

Moreover, the court below erroneously concluded that some proffered regulations failed to create a property right because the regulations "covered only the period when it was in effect." App. A at 8a. Such reasoning perverts this Court's decision in *Larionoff*, in which this Court found that the petitioner had a property right to a re-enlistment bonus under a statute that Congress had since repealed. Under *Larionoff*, at the very least those petitioners who were in the Armed Forces at the time that these previous regulations were in effect, and who subsequently met the twenty year service requirement, have a property right in what was conferred by these regulations.

Moreover, the court's review of these regulations completely ignores the long history of Congress appropriating funds specifically for military retiree health care. In *Federal Crop Insurance Corp. v. Merrill*, 332 U.S. 380, 385-

386 (1947), this Court held that it was "the duty of all courts to observe the conditions defined by Congress for charging the public treasury." While this instruction concerned Congressional power under the Constitution's Appropriations Clause, it is apt for the case at hand as well. Here, the Federal Circuit disregarded this principle by finding that, contrary to this history of appropriations, Congress really did not intend to confer a property right to this benefit. Just as courts cannot grant monetary judgments against the federal government for issues not authorized by Congress, *see Office of Personnel Management v. Richmond*, 496 U.S. 414, 428 (1990) (stating that Congress and not the judiciary has control over public funds), courts cannot refuse to recognize a funded property right authorized by Congress. Review by this Court is necessary to enforce its precedent and to clarify the proper means of determining what is a compensable property right under the Constitution.

2. The court below dismissed petitioners' claim, holding § 1074 did not provide what it termed an "unconditional and absolute" right to health care. App. A at 5a. But nothing in the Constitution or in the opinions of this Court indicates that the statute on which a property right is based must fully encompass all the notions of that right. *See*, discussions concerning *Roth, supra.* Moreover, nothing in this Court's precedents signals that a property right must be absolute to be compensable under the Fifth Amendment. The court below erred in its reasoning concerning the plain meaning of § 1074, and review by this Court is necessary to correct this error.

Additionally, the court below misconstrued the meaning of § 1074. For example, the second sentence of § 1074(b) authorizes the military departments to arrange for the Veterans Administration to provide health care to retirees and for the agency to reimburse the VA for this case.

Thus, the plain language of the statute indicates that what the Federal Circuit found to be a limitation on petitioners' right to health care is really not an absolute limitation. That is, Congress specifically empowered the agency to find other facilities with which to provide treatment to military retirees if more space was needed.

The court's third mistake was its refusal to view § 1074 in its proper historical context. It is a rule "of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *Davis v. Michigan*, at 809. Here, part of the "context" of this statute is that twenty-five years ago agency officials informed Congress during hearings that they read § 1074 to mean the agency had a duty to provide health care to military retirees; Congress, after hearing this, never amended the statute to read otherwise. Another part of the "context" is Congress' continued appropriation of funds for this health care both before and after these hearings. *See, Maddux v. United States*, 20 Ct. Cl. 193, 198 (1885) (finding that when Congress permits regulations to be formulated and published and carried into effect year after year, legislative ratification must be implied); *Hendee v. United States*, 22 Ct. Cl. 134 (1887), *aff'd*, 124 U.S. 309 (1888) (holding that it was error for the court to refuse to give effect to the historical "practice" of the military departments); *cf. OPM v. Richmond* at 439 (stating that when Congress passes a law it expects the Executive Branch to follow the provisions of the law in accordance with Congressional intent) (Marshall, J., dissenting). Moreover, the legislative history shows that Congress consciously drafted § 1074 to provide additional compensation to those military members who put their lives on the line yet received pay that was substantially less than civilians. Given the context of how Congress constructed this statute, the court below

clearly erred in finding that it did not confer a property right of continued health care to petitioners. Review by this Court is needed to correct the court below's failure to consider and respect congressional intent.

Similarly, the court erred in failing to consider the statutory scheme in which § 1074 exists. The legislative history indicates that both Congress and the military departments considered this continued health care as part of a military retiree's retirement pay package. For example, the notes to the Senate Report state that "the words 'retirement' and 'retirement pay' are omitted as surplusage." S. Rep. No. 2095, 89th Cong., 2d Sess. (1958), *reprinted in* 1958 U.S.C.C.A.N. 4625. And, the notes concerning the purposes section of the Medical and Dental Care subchapter, state that "[t]he words 'and certain former members' are inserted to reflect the fact that many of the persons entitled to retired pay are former members only." *Id.* at 4615. It is inconceivable that Congress would refer to retirement pay in a section on health care unless it intended that these two rights be considered unipartite.

In this way, the court below's consideration of *United States v. Larionoff*, 431 U.S. 864 (1977), was patently incorrect. *See* App. A at 9a. The court, in rejecting petitioners' claims that *Larionoff* established their entitlement to continued health care, reasoned that "neither the statutes nor the regulations authorized the military to promise retirees free lifetime medical care." App. A at 10a. Given the above facts and arguments concerning congressional intent with regard to § 1074, the court below was plainly mistaken in making this conclusion. Review by this Court is necessary to correct this deficient statutory interpretation.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari to the United States Court of Appeals for the Federal Circuit should be granted.

Respectfully submitted,

MICHAEL J. KATOR *
LAURA A. STEFANI
KATOR, SCOTT & PARKS, P.L.L.C.
1899 L Street, N.W., Suite 1275
Washington, D.C. 20036
(202) 898-4800

EUGENE O. DUFFY
O'NEIL, CANNON & HOLLMAN, S.C.
111 East Wisconsin Avenue
Suite 1400
Milwaukee, WI 53202
(414) 276-5000

* Counsel of Record

December 8, 1999

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

98-1263

ELEANOR SEBASTIAN, LEWIS HINSON, ROBERT LOWERY, CHARLES W. NEWHOUSER, DENNIS REYNOLDS, HERBERT BROWN, RUDOLPH SINGLETON, JAMES K. ROGERS, BLANE K. LAWSON, LOUIE C. HINSON, WOODY NESBITT, MARION PEARSON, RONALD D'ANELLA, WALTER EWING, LEONARD BARTLETTE AND COALITION OF RETIRED MILITARY VETERANS,

Plaintiffs-Appellants,

v.

UNITED STATES,

Defendant-Appellee.

Decided: August 9, 1999

Before NEWMAN, *Circuit Judge,* FRIEDMAN, *Senior Circuit Judge,* and MICHEL, *Circuit Judge.*

FRIEDMAN, *Senior Circuit Judge.*

The district court dismissed a complaint by retired career military personnel seeking just compensation for the government's alleged taking of their purported right to lifetime free medical care. We affirm.

I

The appellants are retired career members of the military service, surviving spouses of deceased members, and an association of such persons (collectively, the Retirees). They filed a complaint in the United States District Court for the District of South Carolina seeking (1) a declaratory judgment that the government had taken their property without just compensation and (2) just compensation not exceeding $10,000 for each individual plaintiff.

The complaint alleged that "[i]t was the practice of the military departments, stated and restated many times in service regulations, to use the promise of continued medical and dental care as a recruitment and retention tool"; that pursuant to this practice, each retiree was "promised, as an inducement to become a career military service member, that upon retirement his military health care benefits would continue, including dental care and prescription drugs, without cost to him or his survivors, so long as he and his dependents lived"; that the government "[i]nitially . . . did in fact live up to this promise and provided continued medical benefits to plaintiffs and other military retirees, their dependents and survivors without cost," but that "[i]n October 1995, the Secretary of Defense promulgated regulations implementing 'TRICARE,' a comprehensive redesign of the health benefits available to military retirees and their families" and this regulatory program "dramatically reduce[d] the value of medical benefits that are provided to military retirees."

The complaint further alleged that "[c]ontinued medical care was . . . a component of the compensation provided to plaintiffs as consideration for their commitment to continue with military service through retirement"; that "[t]hrough its implementation of TRICARE, [the government] has substantially diminished the coverage pro-

vided to military retirees and the value of that coverage"; and that the government's "actions in diminishing the value of plaintiffs' compensation is a taking of property for which plaintiffs' are entitled to just compensation."

On the government's motion, the district court dismissed the complaint. The court ruled that it lacked jurisdiction to grant the requested declaratory judgment—the Retirees do not challenge this ruling. With regard to the individual claims, the court concluded that they involved "a challenge to the decision of the military departments as to the manner in which to allocate health care resources, and . . . such military decisions are non-reviewable." Alternatively, the court held that the complaint did not state a claim upon which relief could be granted. After concluding that no statute or regulation granted the Retirees a right to the health benefits they claimed, the court stated:

> In the absence of any statutory or regulatory entitlement upon which to base their alleged property interest, plaintiffs' claim is founded only on promises that were made to retired service members at the time they enlisted, or agreed to continue their military careers. It is well established, however, that such representations create no legal interest. [citations omitted]
>
> Accordingly, the court finds that plaintiffs have failed to show a property interest in health care benefits, and their claim for damages resulting from an alleged taking must be dismissed on this ground as well.

II

The sole ground upon which the Retirees seek damages for the government's failure to provide free lifetime med-

ical care is that the government's conduct constituted a taking of their property. They do not state precisely what action by the government they contend constituted the taking, although the complaint suggests that it was the "implementation of the TRICARE program." The "property" that the government allegedly took was a purported "right" to free medical care after retirement which, they assert, constituted deferred compensation for their military service.

A. The right to military pay "must be determined by reference to the [governing] statutes and regulations . . . rather than to ordinary contract principles." *United States v. Larionoff*, 431 U.S. 864, 869 (1977) (footnote omitted). The same principle covers retirement benefits, which include medical care. *See Andrews v. United States*, 175 Ct. Cl. 561, 563 (1966) (military "officers have no vested or contractual right to any particular amount of retired pay"); *Zucker v. United States*, 758 F.2d 637, 640 (Fed. Cir. 1985) ("entitlement to retirement benefits must be determined by reference to the statute and regulations governing these benefits, rather than to ordinary contract principles" (civilian employees)). We therefore look to the governing statutes and regulations to ascertain whether the Retirees have an unconditional right to lifetime free medical care.

Section 1074(b) of Title 10, a statute enacted in 1956 which governs the provision of medical and dental care to active duty and retired members of the Armed Forces and which the Retirees describe as "the predicate of their claims," states that

> a member or former member of a uniformed service who is entitled to retired or retainer pay, or equivalent pay may, upon request, be given medical and dental care in any facility of any uniformed service,

subject to the availability of space and facilities and the capabilities of the medical and dental staff.

Far from granting the Retirees the unconditional and absolute right to medical and dental care that they claim, this provision merely states that a retiree "may" upon request be given such care, "subject to the availability of space and facilities and the capabilities of the medical and dental staff." In other words, instead of having an absolute right to such medical and dental service, they may be given that service subject to its availability. Nothing in the statute authorized recruiters to promise such care unconditionally.

Some of the Retirees, however, claim that their right to health care originated before Congress enacted Section 1074(b) in 1956. Prior to that date, the controlling statute was 5 U.S.C. § 301, "a 'housekeeping statute,' authorizing . . . 'rules of agency organization, procedure, or practice' as opposed to 'substantive rules.' " *Chrysler Corp. v. Brown*, 441 U.S. 281, 310 (1979) (footnote omitted). It provided that "[t]he head of [a] . . . military department may prescribe regulations for the government of his department, the conduct of its employees, the distribution and performance of its business, and the custody, use, and preservation of its records, paper, and property." 5 U.S.C. § 301. That provision stated nothing about health care.

Nor did the various regulations dealing with health care for military retirees upon which the district court relied provide an absolute and unconditional right to care. To the contrary, for many years they have made clear that whether a retiree could receive medical care depended on th fulfillment of various conditions. It suffices to mention a few illustrative examples.

From 1924 until 1950 Army regulations provided that "[t]he admission of retired personnel on inactive status

will be limited to cases which in the judgment of the commanding officer of the hospital will be benefited by hospitalization for a reasonable time." Army Regulation 40-590 ¶ 6b(1) (1935). A superseding regulation continued this grant of discretion to the commanding officer, see Army Regulation 40-506 ¶ 5e (1950), and also provided that "[t]he furnishing of [medical] care to other than personnel [on extended active duty and on the temporary disability retired list] will be on a 'when adequate facilities are available' basis," *id.* at ¶ 3. Before 1951, the Air Force followed the Army's regulations, see *Schism v. United States,* 19 F. Supp. 2d 1287, 1293 (N.D. Fla. 1998), but that year, it promulgated Air Force Regulation 160-73 ¶ 14h (1951), which stated that "[t]he hospitalization of retired inactive Air Force personnel . . . will be limited to cases which in the judgment of the hospital commander will be benefited by hospitalization for a reasonable length of time."

Navy regulations required "all persons of the Navy and Marine Corps, on the retired and active lists" to seek "authority for admission" from "the Surgeon General of the Navy" or "a naval medical officer." Navy Regulation 1920 § 12 Article 1830 (1927). The 1922 Manual of the Medical Department of the United States Navy (the Manual) provided that "[o]fficers and enlisted men of the Navy and Marine Corps and members of the Nurse Corps, on the active list; officer and enlisted men of the Naval Reserve Force, when on active service with the Navy; officer and enlisted men of the Navy and Marine Corps on the retired list; and pensioners are entitled to naval hospital care, in the order mentioned, when room is available." Manual § 13 ¶ 1906 (1922). The 1939 Manual provided that "[r]etired officers and enlisted men, inactive, are not entitled to civilian medical and hospital treatment at Government expense. They are entitled to treatment in naval hospitals and by naval officers when

available upon application." Manual ch. 21 ¶ 3168 (1939). Section 4132.1 of the 1945 Manual, as amended in 1947, stated that "[a] retired officer of the Regular Navy or Marine Corps not on active duty shall, if in need of hospital care, be admitted to any navy hospital upon the application of the individual and the presentation of suitable identification."

Nothing in these regulations provided for unconditional lifetime free medical care or authorized recruiters to promise such care as an inducement to joining or continuing in the armed forces. While the Retirees argue that the abovementioned Section 4132.1 gave those of them who served as officers in the Navy and Marine Corps the right to free unconditional medical care, we cannot agree. The Manual provided guidelines for the Navy's Medical Department, but did not create any right in such officers to the free unconditional lifetime medical care they claim. It related only to hospital care, not the broader services that these Retirees seek, and covered only the period when it was in effect. In any event, in view of the general pattern of the military regulations that provides medical care to retirees only when facilities and personnel were available, we decline to read into the Manual the creation of such an enduring and broad right to unconditional free lifetime medical care.

In sum, we conclude that the Retirees have not shown that they have a right to the health care they say was "taken" by the government. Since the basic premise of their claim fails, their taking claim necessarily also fails.

B. The Retirees reiterate throughout their briefs that the military, after inducing them to join or remain in the armed forces by promising them free lifetime medical care, improperly and unfairly reneged on those promises.

The argument basically is that, as a matter of policy and fairness, the government should furnish the free medical care it promised to provide. That argument, however, should be addressed to Congress, not to the courts. As our predecessor court stated, in rejecting a comparable taking claim by military retirees:

> The arguments in this regard so ably expressed in plaintiffs' briefs should be presented to Congress instead of [the judiciary]. Congress has the power and authority under the Constitution to establish a system for the payment of retired pay [for military service members] and to change the system from time to time as was done in this case. We understand and appreciate the dissatisfaction of the plaintiffs with the change in the retirement pay system, as they have rendered long and faithful service to our country in time of peace and war. However, if they are to get any relief, it must come from Congress, as this is not within [a court's] jurisdiction.

Abbott v. United States, 200 Ct. Cl. 384, 390 (1973).

C. The Retirees also contend that *Larionoff* supports their claim. That case involved a statute that authorized the military services to pay a "variable re-enlistment bonus" to servicemen with a "critical military skill." *Larionoff*, 431 U.S. at 866. During his initial enlistment, the plaintiff Johnson, who had a critical skill, was promised such a bonus if he would agree to extend his enlistment, which he did. *See id.* at 879. Prior to the beginning of his extended term of service and before he had received his bonus, however, Congress repealed the bonus it had authorized and provided a different bonus. *See id.* at 878. The military then refused to pay Johnson the bonus in effect at the time he agreed to extend his enlistment. He filed suit for the bonus. The Court reasoned:

> by entering an agreement to extend his enlistment, [Johnson] became entitled to receive at some future date a VRB at the award level then in effect (provided that he met the other eligibility criteria). Thus, unless Congress intended, in repealing the VRB program in 1974, to divest Johnson of the rights he had already earned, and constitutionally could do so, the prospective repeal of the program could not affect his right to receive a VRB, even though the date on which the bonus was to be paid had not yet arrived.
>
> Of course, if Congress had such an intent, serious constitutional questions would be presented. . . . In view of these problems, we would not lightly conclude, in the absence of a clear expression of congressional intent, that in amending [the provision at issue] and establishing a new bonus system, Congress intended to affect the rights of those service members who had extended their enlistments and become entitled to receive VRB's.

431 U.S. at 879. The Court discerned no such intention on the part of Congress and held that Johnson was entitled to the bonus in effect at the time he agreed to extend his enlistment. *See id.* at 879-80.

Larionoff is distinguishable from the present case in a critical respect. The statute there explicitly authorized the services to provide the bonus. In the present case, in contrast, neither the statutes nor the regulations authorized the military to promise retirees free lifetime medical care. Although there is some broad language in *Larionoff*, the actual holding is quite narrow, namely, that the statute repealing the variable reenlistment bonus did not apply to bonuses promised and extension enlistments made, prior to the statute's effective date.

D. Since we conclude that the district court properly dismissed the complaint for failure to state a claim upon which relief could be granted, we need not consider the district court's other ground of dismissal—that the Retirees' claim involved the non-judicially reviewable issue of the military's allocation of its health care resources.

III

After the district court had dismissed their complaint, the Retirees filed a motion to alter or amend the judgment. In this motion, the Retirees first contended that the superseded military regulations upon which the district court relied, discussed above, were "matters outside the pleadings" and that the district court therefore was required to treat the government's motion to dismiss as one for summary judgment, which would have permitted them to obtain discovery before the court decided the motion. *See* Fed. R. Civ. P. 12(b). In deciding whether to dismiss a complaint under Rule 12(b)(6), the court may consider matters of public record. *See Henson v. CSC Credit Services*, 29 F.3d 280, 284 (7th Cir. 1993); *United States v. Provident Nat'l Bank*, 259 F. Supp. 373, 376 (E.D. Pa. 1966) (taking judicial notice of a statute not mentioned in the complaint); 5A Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1357 (2d ed. 1990). The district court here correctly concluded that the materials at issue were "historical regulations, since superseded, which are matters of public record" and properly denied this portion of the Retirees' motion.

The Retirees also sought to amend the complaint "to include a claim of equitable estoppel" to reflect the court's "recogni[tion]" of the "defendant's moral obligation to provide lifetime medical benefits to plaintiffs." The district court denied this request without discussion.

Motions to amend the complaint usually are made while the case is pending before the district court, to reflect developments in the district court proceedings. Here, however, the case in the district court was over when the Retirees sought to amend. In that situation it would normally require an exceptional showing to justify the filing of an amended complaint. We review the district court's refusal to grant leave to amend for abuse of discretion. *See Lone Star Steakhouse & Saloon, Inc. v. Alpha of Virginia, Inc.*, 43 F.3d 922, 940 (4th Cir. 1995).

Neither in their motion to amend nor before this court have the Retirees made such a showing. They provide no explanation or justification for their failure to raise the point while the case was still pending before the district court, either in their original complaint or by a motion to amend. They do not point to any newly discovered evidence or new legal developments. It appears that what happened was that, after their complaint had been dismissed for failure to state a claim upon which relief could be granted, they sought to resurrect their case by asserting a new legal theory that could have been, but was not, timely asserted while the district court case was still alive. In the circumstances, the district court did not abuse its discretion in refusing to permit the Retirees to amend their complaint.

CONCLUSION

The judgment of the district court is

AFFIRMED.

APPENDIX B

[Filed Dec. 10, 1997]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

C.A. # 2:96-3822-23

COALITION OF RETIRED MILITARY VETERANS, *et al.*,
Plaintiffs,

v.

UNITED STATES OF AMERICA,
Defendant.

ORDER

This matter is before the Court upon defendant's motion to dismiss. A hearing on the motion was held on July 30, 1997, and the court took the motion under advisement.

I. BACKGROUND

The individual plaintiffs in the present case are all retired military service members, or the spouses of deceased retired service members. The Coalition of Retired Military Veterans ("CRMV") is a South Carolina organization whose members are military retirees or the survivors of such retirees.[1] Both the individual plaintiffs and

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1 "Duty is the sublimest word in the English language." Robert Edward Lee. This court is mindful that all of the plaintiffs are

the organization have brought suit seeking a declaratory judgment that the United States has taken the individual plaintiffs' property without just compensation, in violation of the Fifth Amendment. Individual plaintiffs alone seek damages based upon this alleged taking.

According to the retirees, they were induced to become career service members, and to continue their military careers, by the promise that they and their families would receive free and unconditional lifetime health care in military medical facilities upon their retirement from the armed services. They maintain that this promise was made at the time of their enlistments, re-enlistments, and/or commissionings and that service regulations authorized the various military departments to make such promises. Plaintiffs claim that, in recent years, the military has failed to live up to this promise and that, as a result, retired service members' "deferred compensation" (in the form of health care benefits) has been taken without just compensation.

The United States has moved to dismiss plaintiffs' claims pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6) on the grounds that this court does not have jurisdiction over plaintiffs' claims and because the complaint fails to state a claim upon which relief may be granted.

II. MOTION TO DISMISS

To survive a motion to dismiss for failure to state a claim, the complaint must allege facts which, if proven, would entitle plaintiffs to relief. *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974). The court must accept all well-plead facts alleged in the complaint as true, *Randall v.*

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men and women who have done their duty. This court now faces its duty.

United States, 30 F.3d 518, 522 (4th Cir. 1994), and find all reasonable inferences from those facts in the light most favorable to the plaintiffs. *Scheuer*, 416 U.S. at 236. The court need not, however, accept plaintiffs' legal conclusions. *See Randall*, 30 F.3d at 522; *Estate Const. Co. v. Miller & Smith Holding Co.*, 14 F.3d 213, 217-18 (4th Cir. 1994). Regardless of the alleged facts, Rule 12(b)(6) authorizes a court to dismiss a complaint on a dispositive issue of law. *Neitzke v. Williams*, 490 U.S. 319, 326-27 (1989); *Ryder v. Freeman*, 918 F. Supp. 157, 159-60 (W.D.N.C. 1996).

III. JURISDICTION

A. Reviewability of Military Decisions

The court with genuine regret agrees with defendant that plaintiffs' complaint is a challenge to the decision of the military departments as to the manner in which to allocate health care resources, and that such military decisions are non-reviewable. This conclusion is dictated by the Fourth Circuit's recent holding that "[t]he Constitution assigns the conduct of military affairs to the Legislative and Executive branches . . . fully and directly," and that "[t]he judiciary has no authority to make rules for the regulation of military forces." *Thomasson v. Perry*, 80 F.3d 915, 924 (4th Cir.), *cert. denied*, 117 S. Ct. 358 (1996) (naval lieutenant seeking declaratory and injunctive relief to prevent his discharge pursuant to "Don't Ask, Don't Tell" policy challenged on Equal Protection and First Amendment grounds).

To minimize interference with the internal affairs of the military, courts make a detailed inquiry before reviewing the decision of a military authority. Under the rule articulated in *Mindes v. Seaman*, 453 F.2d 197 (5th Cir. 1971), a plaintiff must allege that the military has vio-

lated a statutory, regulatory, or constitutional provision. Next, plaintiff must demonstrate that he has exhausted his available intra-service administrative remedies. If a plaintiff meets these two threshold requirements, the court then proceeds to a four-prong test which balances the affected interests to determine whether review of the military's decision should be granted. The court must consider the following:

> (1) the nature and strength of the plaintiff's challenge to the military determination; (2) the potential injury to the plaintiff if review is refused; (3) the type and degree of anticipated interference with the military function; (4) the extent to which exercise of military expertise or discretion is involved.

Id. at 201-02. The Fourth Circuit adopted the *Mindes* test in *Williams v. Wilson*, 762 F.2d 357 (4th Cir. 1985).

As to the first of the threshold requirements, plaintiffs assert a violation of the Fifth Amendment's takings clause. In the present case, the retirees cannot establish a property right in the benefits that they claim are owed to them and have failed to allege any facts to show a taking. Under *Mindes*, "[a]n obviously tenuous claim of any sort must be weighted in favor of declining review." 453 F.2d at 201. As to the second requirement, plaintiffs have similarly failed to allege that the retired service members have exhausted their intra-service administrative remedies.

Even if the court were to find that plaintiffs had met these threshold showings, the balancing test under *Mindes* also weighs against a review of plaintiffs' claim. First, the military's decision as to the allocation of health care resources was made in accordance with the law. Second, there is no potential injury to the retirees. They remain eligible for medical care under CHAMPUS [2], Tricare, or

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[2] CHAMPUS stands for the Civilian Health and Medical Program of the Uniformed Services.

Medicare and, because they have no property interest in their benefits, they have suffered no taking. Third, a judicial determination that the retirees had suffered a taking and were entitled to compensation would interfere significantly with the military by obligating defendant to pay damages, and by rendering it vulnerable to claims for damages by numerous other military retirees throughout the country. Finally, it is clear to the court that military expertise and discretion are involved in allocating health care resources among active duty and retired service members and that this decision as to how to spend limited funds is one that is best left to the military.[3] This is especially true in today's environment when the Congress continues to close military bases and facilities around the globe.

Accordingly, the court finds that plaintiffs' claims are non-reviewable and that the action must be dismissed. Even if the court were to review the military's decision in

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[3] In this regard, the court notes that legislative and executive branch efforts to improve health care for military retirees are ongoing. Most recently, § 4015 of the Balanced Budget Act of 1997, Pub. L. No. 105-33, 111 Stat. 251, establishes a demonstration project under which Medicare is to reimburse the Department of Defense for care provided in military hospitals to individuals covered by Medicare. In stating its support for this "Medicare Subvention" project, the Senate Armed Service Committee signaled its awareness of the precise issue raised in plaintiffs' complaint here, and its view as to military retirees' alleged "entitlement" to health care in military facilities.

> "The issue of health care for military retirees over 65 is of special concern to the committee. The nation has incurred a moral obligation to attempt to provide health care to military retirees who believed they were promised lifetime health care in exchange for a lifetime of military service. The nation fulfills its obligation through Medicare."

S. Rep. No. 105-29, at 295 (1997).

this area on the merits, plaintiffs' claims nevertheless would fail for the reasons discussed *infra*.

B. The Tucker Act

Assuming that the military's decision at issue is reviewable, the court has jurisdiction over plaintiffs' monetary claims, up to $10,000.[4] 28 U.S.C. § 1346(a)(2) ("Tucker Act"). The Tucker Act does not, however, provide a basis for the declaratory relief plaintiffs seek. *Lee v. Thornton*, 420 U.S. 139, 140 (1975) ("The Tucker Act empowers district courts to award damages but not to grant injunctive or declaratory relief."); *Richardson v. Morris*, 409 U.S. 464, 465-66 (1973); *Ballam v. United States*, 552 F. Supp. 390, 393 (D.S.C. 1982); *cf. Bobula v. United States Dep't of Justice*, 970 F.2d 854, 858-59 (Fed. Cir. 1992) ("equitable relief must be incidental to and collateral to a claim for money damages"); *Portsmouth Redevelopment & Housing Authority v. Pierce*, 706 F.2d 471, 474 (4th Cir. 1983) (Claims Court can issue declaratory relief that is tied to and subordinate to a monetary award). Because the court cannot grant the declaratory relief that plaintiffs seek, the action should be dismissed on these grounds as well.

IV. FIFTH AMENDMENT TAKING

The retired service members believe and assert that they have a vested property right in their retirement bene-

[4] Plaintiffs assert that their claims are for less than $10,000. As to any claims which would exceed $10,000, the court lacks Tucker Act jurisdiction. 28 U.S.C. § 1346(a)(2). Nonetheless, the court also lacks Tucker Act jurisdiction to the extent that plaintiffs' complaint seeks unspecified future damages. *See Eastport S.S. Co. v. United States*, 372 F.2d 1002, 1007 (Ct. Cl. 1967) (jurisdiction under the Tucker Act requires an allegation "that the particular provision of law relied upon grants the claimant, expressly or by implication, a right to be paid a certain sum").

fits that is protected by the Takings Clause of the Fifth Amendment. However, "[p]roperty interests . . . are not created by the Constitution." Rather, they are created and defined by existing rules or understandings that stem from an independent source of law that secure certain benefits and that support claims of entitlement to those benefits. *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972). Plaintiffs advance two possible theories of law upon which to ground this alleged property interest. First, they claim that retired service members' health care benefits are a form of "deferred compensation." Second, they claim that regulations promulgated under 10 U.S.C. § 1074(b) and 5 U.S.C. § 301 entitle retired service members to free, lifetime health care.

A. Deferred Compensation

Relying on *Barker v. Kansas*, 503 U.S. 594 (1992), plaintiffs characterize lifetime health care at military medical facilities, for retired service members and their dependents, as an element of "deferred compensation," [5] and allege that this is protected property under the Fifth Amendment.

Plaintiffs' reliance on *Barker*, however, is misplaced. *Barker* decided a narrow challenge to state taxation of military pensions under 4 U.S.C. § 111 ("Public Salary

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[5] Plaintiffs fail to define the term "deferred compensation." In the Fourth Circuit, the term has been used in a variety of contexts, including Medicare reimbursement, *Charlotte Memorial Hosp. v. Bowen*, 665 F. Supp. 455 (W.D.N.C. 1987), bankruptcy, *In re Constant Care Community Health Ctr., Inc.*, 99 B.R. 697 (Bkrcy. D. Md. 1989), ERISA, *Darden v. Nationwide Mutual Ins. Co.*, 717 F. Supp. 388 (E.D.N.C. 1989), income tax, *Lundy Packing Co. v. United States*, 302 F. Supp. 182 (E.D.N.C. 1969), and collective bargaining, *Upshur Coals Corp. v. UMWA Dist. 31*, 933 F.2d 225 (4th Cir. 1991). Plaintiffs' use of this term with respect to health care benefits for military retirees is of no apparent legal significance.

Tax Act") and the doctrine of intergovernmental tax immunity. In that case, the Court concluded that there were insufficient diferences between retired state and local government employees and military retirees to justify differential tax treatment of their pensions under Kansas law. In particular, the Court held that "[*f*]*or purposes of 4 U.S.C. § 111*, military retirement benefits are to be considered deferred pay for past services." 503 U.S. at 605 (emphasis supplied). However, the Court also acknowledged that, for other purposes, military retirement pay might be considered reduced compensation for current services. *Id.* at 602.

Moreover, *Barker* did not address the status of nonpecuniary retirement benefits such as health care. If health care benefits for military retirees are characterized as deferred compensation for past services, as plaintiffs allege, then the value of those benefits should also be considered taxable income. However, under §§ 105 and 134 of the Internal Revenue Code, these benefits are not taxed as income to recipients. Given plaintiffs' heavy reliance on *Barker*, a tax case, and given that military retirees' health care benefits are not taxed, plaintiffs cannot establish a property interest in health care benefits based on this "deferred compensation" theory.

B. Regulations Under 10 U.S.C. § 1074(b) and 5 U.S.C. § 301

Cases decided since *Barker* indicate that the Supreme Court did not intend to upset the well-established principle that the entitlement to military benefits is determined exclusively by reference to the statutes and regulations governing such benefits. *United States v. Larionoff*, 431 U.S. 864, 869 (1977); *see also Earnest v. United States*, 33 Fed. Cl. 341, 344 (1995) ("the benefits owing to a military service member are governed by statutes and reg-

ulations"); *Cedillo v. United States*, 37 Fed. Cl. 128, 129 (1997) ("[a] serviceman's entitlement to pay and benefits must be traceable to a statutory source"); *Costello v. United States*, 587 F.2d 424, 427-28 (9th Cir. 1978) (retirement pay is statutory compensation that can be altered prospectively).[6]

The statute governing military retirees' entitlement to health care benefits is 10 U.S.C. § 1074(b), which provides that "a member or former member of a uniformed service who is entitled to retired or retainer pay . . . may, upon request, be given medical . . . care in any facility of any uniformed service, subject to the availability of space and facilities and the capabilities of the medical . . . staff." Plaintiffs argue that § 1074(b) "provides the congressional authorization for the military departments to promise continued medical care [to military retirees] as an inducement to career service." Opposition to Defendant's Motion to Dismiss at 15-16. They claim that "the Armed Services, pursuant to the authority granted to them by Congress, have guaranteed military retirees and their dependents that they shall receive free medical care and dental care for life." *Id.* at 5.

The court must reject plaintiffs' contention that § 1074(b) confers authority on the military branches to guarantee free lifetime medical care to retirees and their dependents. First, plaintiffs cite to no regulations under § 1074(b) guaranteeing such care, but only cite to re-

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[6] Plaintiffs seek to rely, in part, upon promises no doubt made by recruiters to create this claimed property interest for purposes of a Fifth Amendment taking. However, as the cases cited above demonstrate, military retirees' entitlement to benefits arises only from statute. Plaintiffs' reliance on *United States v. Winstar*, 116 S. Ct. 2432 (1996), is misplaced because *Winstar* concerns whether the government may assert certain defenses to breach of contract, and plaintiffs in this case are not seeking to establish that they have a contractual relationship with the government.

cruiting materials that make general representations as to eligibility for continued health care for retirees and their dependents.[7] Even if the military departments had promulgated regulations under § 1074(b) that made an unequivocal promise of lifetime medical care for retirees and their dependents, the language of § 1074(b) itself is clearly conditional. Any regulations purporting to guarantee free and unconditional lifetime health care to retirees and their dependents would be inconsistent with the language of the statute and therefore invalid. *Larionoff*, 431 U.S. at 873 n.13 ("A regulation which . . . operates to create a rule out of harmony with the statute . . . is a mere nullity.") (citing *Manhattan General Equip. Co. v. Commissioner*, 297 U.S. 129, 134 (1936)).

Furthermore, under § 1074(b), "a retired member of a uniformed service is not entitled to medical care as a matter of right," *Lord v. United States*, 2 Cl. Ct. 749, 756 (1983), and "retired personnel who fail to receive such care cannot successfully maintain an action for money damages based on such failure." *Id.* at 757; *see also Watt v. United States*, 246 F. Supp. 386, 388 (E.D.N.Y. 1965) ("furnishing [medical care in a military facility] to a retired soldier is discretionary, not mandatory"). Because the law states that retirees are not entitled to health care as a matter of right, the representations upon which plaintiffs rely are to no effect.

Plaintiffs also rely on 5 U.S.C. § 301, and unspecified regulations thereunder, as authority for an unconditional promise to provide medical care to military retirees before 10 U.S.C. § 1074(b) was enacted in 1956. Section 301, however, does not support plaintiffs' claim of entitlement

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[7] The court does not doubt that recruiters made specific promises to certain recruits who relied upon those promises.

to the relief they seek. It is merely "a 'housekeeping statute,' authorizing . . . 'rules of agency organization, procedure, or practice' as opposed to 'substantive rules.' " *Chrysler Corp. v. Brown*, 441 U.S. 281, 310 (1979). Also, it should be noted that the regulations concerning health care for military retirees issued by the various service branches before 10 U.S.C. § 1074(b) was enacted in 1956 did not provide for unconditional lifetime care for retirees and their dependents.[8] For example, paragraph 6 of Army Regulation ("AR") 40-590, first promulgated in 1924, set forth a comprehensive list of "[p]ersons who may be admitted to Army hospitals . . . [w]hen suitable facilities for hospitalization are available." Retired personnel were not included on that list. In 1935, paragraph 6 of AR 40-590 was amended to provide that "the admission of retired personnel on inactive status will be limited to cases which in the judgment of the commanding officer of the hospital will be benefited by hospitalization for a reasonable time." In 1950, AR 40-590 was superseded by AR 40-506. Subparagraph 5e of AR 40-506 similarly restricted care of retired personnel to the discretion of the hospital's commanding officer. Paragraph 3 of AR 40-506 additionally provided that the "[f]urnishing of [medical] care to other than personnel [on extended active duty and on the temporary disability retired list]

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[8] Nevertheless, even if military retirees and their families had enjoyed an unconditional right to health care in military medical facilities before 10 U.S.C. § 1074(b) was enacted in 1956, subsequent limitations on such care to a "space available" basis would not constitute a taking. "[B]y removing an advantage previously extended to certain veterans, the legislature merely made an adjustment of the benefits and burdens of economic life, not a taking requiring government compensation." *Hoffman v. City of Warwick*, 909 F.2d 608, 618 (1st Cir. 1990) (internal quotations omitted).

will be on a 'when adequate facilities are available' basis." [9]

In the absence of any statutory or regulatory entitlement upon which to base their alleged property interest, plaintiffs' claim is founded only on promises that were made to retired service members at the time they enlisted, or agreed to continue their military careers. It is well established, however, that such representations create no legal entitlement. *See Kizas v. Webster*, 707 F.2d 524, 539 (D.C. Cir. 1983) ("[a] legitimate claim of entitlement to a government [employee] benefit does not transform the benefit *itself* into a vested right"); *Kania v. United States*, 650 F.2d 264, 268 (Ct. Cl. 1981) ("the rights of . . . military . . . employees against the govern-

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[9] Regulations issued by the other branches of the armed services before 1956 have a similar effect.

The Air Force followed Army regulations from its formation in 1947 until Air Force Regulation ("AFR") 160-73 was published in 1951. Paragraph 14h (later paragraph 7j) of AFR 160-73 provided that "the hospitalization of retired inactive Air Force personnel . . . will be limited to cases which in the judgment of the hospital commander will be benefited by hospitalization for a reasonable length of time."

In regulations in effect through the first half of this century, the Navy provided that all Navy and Marine personnel on the active and retired lists were required to seek authority for admission to Army and Navy hospitals. Article 1830, NAVREGS 1920. Authority for such admissions was not presumed. *See* Manual of the Medical Department of the Navy ("MEDMAN") § 1906 (1922) ("[o]fficers and enlisted men of the Navy and Marine Corps and members of the Nurse Corps, on the active list; officers and enlisted men of the Naval Reserve Force, when on active service with the Navy; officers and enlisted men of the Navy and Marine Corps on the retired list; and pensioners are entitled to naval hospital care, *in the order mentioned, when room is available.*") (emphasis supplied); *see also* MEDMAN § 3168 (1939) ("[r]etired officers and enlisted men, inactive, . . . are entitled to treatment in naval hospitals and by naval medical officers *when available by application*. . . .") (emphasis supplied).

ment do not turn on contract doctrines but are matters of legal status *even where compacts are made*") (emphasis supplied); *Shaw v. United States,* 640 F.2d 1254, 1260 (Ct. Cl. 1981) ("Federal officials who by act or word generate expectations in the people they employ, and then disappoint them, do not *ipso facto* create a contract liability running from the Federal Government to the employee, as they might if the employer were not the government.") (citations omitted).

Accordingly, the court finds that plaintiffs have failed to show a property interest in health care benefits, and their claim for damages resulting from an alleged taking must be dismissed on these grounds as well.

V. CONCLUSION

It is, therefore,

ORDERED, for the foregoing reasons that defendant's motion to dismiss is GRANTED and plaintiffs' action is DISMISSED.

AND IT IS SO ORDERED.

/s/ Patrick Michael Duffy
PATRICK MICHAEL DUFFY
United States District Judge

Charleston, South Carolina
December 10th, 1997

APPENDIX C

[Filed Jan. 13, 1998]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

C.A. # 2:96-3822-23

COALITION OF RETIRED MILITARY VETERANS, *et al.*,
Plaintiffs,

v.

UNITED STATES OF AMERICA,
Defendant.

ORDER

This matter is before the court on plaintiffs' motion to alter or amend the judgment issued by the court on December 10, 1997 in the present case. Because plaintiffs have not shown that there has been an intervening change in controlling law, that new evidence has become available, or that the court has made clear error of law, their motion must be denied. *Hutchinson v. Staton*, 994 F.2d 1076, 1081 (4th Cir. 1993) (citations omitted).

Nonetheless, for purposes of clarity, the court will briefly address plaintiffs' argument that the court's reference to regulations submitted by defendant required the court to treat defendant's motion to dismiss as a motion for summary judgment. Plaintiffs assert that, in referring to regulations issued by various branches of the armed

forces, the court looked to "matters outside the pleadings" requiring the court to consider defendant's motion as one for summary judgment under Fed. R. Civ. P. 12(c). Based on this assertion, plaintiffs argue that they should have been permitted to "make a record" through discovery. This argument is without merit. The service regulations referenced in the court's December 10 order are not "matters outside the pleadings" as contemplated under Rule 12(c). Rather, they are historical regulations, since superseded, which are matters of public record. Defendant provided copies of these regulations to the court and plaintiffs with its proposed order for the convenience of the court. *Cf. Anheuser-Busch, Inc. v. Schmoke*, 63 F.3d 1305, 1312 (4th Cir. 1995), *vacated and remanded*, 116 S. Ct. 1821 (1996), *readopted*, 101 F.3d 325 (4th Cir. 1996) (transcript and studies constituting legislative history of challenged local ordinance could be considered by court on motion to dismiss as a matter of law).

It is therefore,

ORDERED, for the foregoing reasons and those reasons articulated in the court's December 10, 1997 order, that plaintiffs' motion to alter or amend judgment is DENIED.

AND IT IS SO ORDERED.

/s/ Patrick Michael Duffy
PATRICK MICHAEL DUFFY
United States District Judge

Charleston, South Carolina
January 13th, 1998